Supreme Court, U. S.
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79-1261

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No.

J. C. ATHANS ENGINEERING AND CONSTRUCTION COMPANY INC., a California corporation,
Petitioner,

vs.

WILLIE A. POWELL and JOHN W. MORRIS, doing business under the fictitious firm name of ESQUIRE ELECTRIC COMPANY, a co-partnership,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal for the State of California for the Second Appellate District

Calif Ct App, 2d App Dist

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Petitioner, J. C. ATHANS ENGINEERING AND CONSTRUCTION COMPANY, INC. respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Court of Appeal of the State of California for the Second Appellate District (Division Two) filed in this case on September 18, 1979.

OPINIONS BELOW

The California Supreme Court rendered no opinion in the case, but simply denied the petition for hearing. The opinion of the Court of Appeal of the State of California for the Second Appellate District, which was not certified for publication, is attached to this petition as Appendix B. Although the trial court rendered no opinion as such, a transcript of the relevant proceedings before it is reprinted as Appendix A.

JURISDICTION

The California Supreme Court denied the petition for hearing in this case on November 15, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

I. What considerations and procedures are required of a court in allowing the withdrawal of a corporate defendant's counsel in mid-trial in a state which precludes a corporation from appearing through its lay officers?

II. Were petitioner's due process rights violated when the trial court permitted withdrawal of its counsel in mid-trial over its protests, refused any further continuance (which caused universal attorney rejection of petitioner's case since it was impossible to prepare to continue the trial, inter alia because no transcript of the prior 16 days of trial could be had in the time available) and then silenced petitioner throughout the remainder of the trial?

CONSTITUTIONAL PROVISION INVOLVED

Petitioner's claim is based upon United States Constitution, Amendment XIV, Section 1.

STATEMENT OF THE CASE

In view of the remarkable occurrences at trial, petitioner takes the unusual step of reprinting the relevant part of the transcript as Appendix A. Petitioner respectfully urges the Court to read Appendix A for itself—not only to confirm petitioner's Statement of the Case, but because no mere summary can fully convey the quality of the proceedings below.

I

THE WITHDRAWAL OF PETITIONER'S ONLY COUNSEL IN MID-TRIAL

This appeal arises out of a Los Angeles Superior Court's civil damage action in which petitioner was the defendant. After sixteen days of trial (during which the plaintiffs had presented most of their case) a ninety day recess was taken for a reference to a CPA.

Petitioner is a small family corporation, none of whose officers have any more legal training than any other laymen whose education is in engineering science. Lacking house counsel, petitioner was defended at the trial by the firm of Svenson & Garvin, which it had previously employed for a variety of legal tasks. Two months into the ninety day recess the trial court granted the Svenson firm's motion to withdraw as defense counsel. At this withdrawal hearing the Svenson firm was represented by

a Mr. Jones, who had been trying the case for petitioner. Petitioner was represented by its secretary, Mr. Jerry Athans, Jr. upon whom the court specifically called.[1] The Svenson firm withdrawal motion was based upon petitioner's alleged failure to keep current with its payments to the firm. Petitioner was contending, as a set-off against the current bills, that the Svenson firm was indebted to it for previous improper charges and/or legal malpractice. Without conceding these claims, petitioner offered to pay a $1,000.00 retainer and negotiate an agreeable rate for Mr. Jones to finish out the trial.

Before Mr. Athans could finish explaining petitioner's position, the court responded with a strong defense of Mr. Jones' trial skills—which turned into a remarkable expression of hostility against petitioner. Mr. Athans was told that he was a liar and so was his father and so was his brother. Subsequently the court opined that, since it could not believe anything the Athanses said, it could scarcely expect the Svenson firm to accept their agreement to pay for representation in the remainder of the trial.[2] The court then asked Mr. Jones whether petitioner's proposal was acceptable. Upon receiving a negative answer, the court granted the firm's motion to withdraw. In so doing, it disregarded petitioner's offer to pay a $1,000.00 retainer down. Moreover, it disregarded the undisputed evidence that the Svenson firm had represented petitioner for a

[1]The significance of the court's failure to enforce, or even inform petitioner of, the rule that a corporation can only be heard through counsel will appear. See n. 5 and accompanying text, infra.

[2]See Appendix A at A-6 & A-7.

period of several years without any difficulty in payment until the fee dispute developed.[3]

II

ADVANCE PRECLUSION OF ANY CONTINUANCE FOR PETITIONER TO FIND NEW COUNSEL OR FOR NEW COUNSEL TO ADEQUATELY PREPARE

Immediately after permitting the Svenson firm's withdrawal, the court gave Mr. Athans two further instructions in no uncertain terms: First, petitioner must secure counsel in the 30 days before trial was scheduled to recommence. Second, this newly secured counsel must be prepared to try the case at the scheduled time. No continuance would be allowed *under any circumstances*—"And if you come in here and ask for a continuance on the ground that you don't have counsel, I will tell you right now that it will be denied. Do you understand that?" In explanation the court noted that:

> one of the famous gimmicks of litigants who stall and delay is to keep changing attorneys in mid-stream. Then the new attorney says, "Well I have to get acquainted with it and want a delay." That's not going to work here, if that's your motive. I'm not saying it is.

[3]The declaration in support of the Svenson firm's motion to withdraw stated that monies had been received from petitioner as late as June 10 and July 27 of that year. Without objection from Mr. Jones, petitioner's spokesperson at the hearing stated that payments on other work had been made to the Svenson firm by petitioner even after July 27. It appears from the record below that petitioner had been represented by the Svenson firm since at least January, 1974. Since the firm agreed to represent petitioner in the trial in mid-1976 it may be assumed that a satisfactory history of prior payment existed.

It appears that the trial court gave no consideration to the combined effect these rulings (allowing withdrawal and precluding continuance) would have on petitioner's due process right to be heard. The court knew, because Mr. Athans had specifically informed it, that petitioner had spoken to two other firms about taking up the case; and that petitioner had been informed that about two months (not thirty days) lead time would be required. That was surely not an unreasonable estimate, given the necessity of first disposing of previous clients' work and then preparing to enter a completely unfamiliar case at mid-trial. Petitioner's new counsel would necessarily have to study the pleadings, acquaint themselves with the potential witnesses, perhaps research certain issues, i.e. do all the things necessary to devising a trial strategy. Most important of all (and prerequisite to most of the other activities) petitioner's new counsel would have to obtain and study the transcript of the first sixteen days of trial. But the trial court made no attempt to determine if such a transcript would be available at all, much less early in the thirty days before trial was scheduled to recommence.[4]

III

PETITIONER SILENCED WHEN TRIAL RESUMED

When trial resumed 30 days after the withdrawal hearing the court noted that "the corporation [petitioner] is here without counsel." Mr. Athans attempted to explain; he was summarily told to sit down and be quiet. Ruling that a corporation cannot be heard except through counsel,

[4]In fact petitioner can represent to this Court that, upon inquiry of the court reporter, petitioner was told no transcript would be available for 100 days. See p. 11 infra.

the court silenced petitioner as plaintiffs put on the remainder of their case and then gave judgment for plaintiffs.[5]

IV

AFFIRMANCE BY THE CALIFORNIA COURT OF APPEAL

On appeal the trial court's judgment for plaintiffs was affirmed in a three page opinion that was not certified for publication. (In addition, the appellate court declared the appeal "frivolous" and ordered petitioner to pay $3,000.00 special sanction costs.)

The affirmance had two bases. The first was that, even if petitioner had been denied due process, it was mere harmless error since petitioner had no case anyway: "On this appeal the corporation does not attack the findings of the trial court, does not suggest that other evidence might

[5]Although petitioner does not challenge the general rule that corporations must appear through counsel, it does assert that refusing it a chance to make a brief statement of explanation and request for continuance denied it due process under the circumstances of this case. The trial court had given petitioner no warning about the rule and had itself violated it. It is true that during the withdrawal hearing it had instructed Athans to obtain counsel who would be ready to try the case within 30 days. But it never informed him, nor did he know, that California law precludes a corporation from appearing through a lay representative. Mr. Athans' attempt to explain why petitioner had been unable to secure counsel shows that he had no expectation that the court was going to invoke the rule in this way. Nor should he have had such an expectation since the court itself had called upon him to speak for the corporation in the withdrawal hearing. Moreover, the latest California case enunciating the rule nevertheless allowed a lay representative of the corporation to appear for the purpose of making an explanation and moving a continuance. *Vann v. Shilleh*, 54 C.A.3d 192, 196, 126 C. Rptr. 401, n. 2 (1975). See n. 20 infra.

have been produced, does not explain why no motion for new trial was made. . . ."[6]

If the court meant by this statement to suggest that petitioner had no witnesses to present, it was in error. As indicated, defense counsel withdrew during a hiatus in the trial that occurred before plaintiffs' case was even finished. Although three of petitioner's potential witnesses had apparently been called as adverse witnesses by plaintiffs, these and other witnesses might have been put on by petitioner—had petitioner been given a chance to present a case. At least that is what Mr. Jones, who defended the case for the Svensen firm, had contemplated, according to his own statement in the record.[7] In a pleading filed in the

[6]See Appendix B-2. The reference to petitioner's failure to move for a new trial should not be understood as implying that petitioner has thus forfeited the right to appeal its due process claims or any other legal claim. The Court of Appeal opinion does not purport to so hold. Nor, if it did, would it be consistent with California law on the subject. See, e.g., *Mattox v. Isley* 111 Cal. App. 2d 774, 780, 245 P. 2d 664 (1952) (respondent "now asserts that appellants have waived their rights to object to such order by virtue of their having failed to assign it as error on their motion for a new trial. Respondent's argument is erroneous . . . Although it is common practice for a dissatisfied litigant to urge errors of law as grounds for a new trial it is not compulsory that he do so, but he may, instead, present them on appeal as grounds for reversal of the judgment."), quoted with approval, *Estate of Barber*, 49 Cal.2d 112, 118-119, 315 P.2d 317 (1957), and cases there cited. See also 6 Witkin, *California Procedure* 4268 and 4 Cal. Jur. 3d "Appellate Review" 129, both citing numerous cases to the proposition that "an error may be raised on appeal though it could have been made the basis of a motion for new trial" except where "the error claimed was excessive or inadequate damages."

[7]During the withdrawal hearing, the court stated to Mr. Athans: "Now, let me tell you something. This trial isn't over yet. Most of the evidence is in, I think all the evidence is in if I am not mistaken . . . [Then, in an aside to counsel:] is that not true?" • • •

trial court immediately after judgment was entered, petitioner's new counsel estimated that petitioner had been "denied the opportunity to present about 80% of its case."[8]

The Court of Appeal's second justification for upholding the judgment arose out of respondents' attempt during the first part of the trial to join the individual Athans family members as co-defendants. Before the trial recessed respondents had moved for permission to amend. The court deferred this issue until after the recess. When the trial recommenced an attorney named Wilson stepped forward on behalf of the individual Athanses to oppose respondents' motion to amend. He argued that it would be unfair to bring these individuals into a case in mid-trial, particularly when the proposed amendments stated new theories of action not covered by any previous pleadings or discovery in the case. Under a barrage of questioning from the court and respondents' counsel, Mr. Wilson repeatedly stated that he did not represent the corporation and was not prepared to take up the trial for it. He had committed himself only to research and present the individuals' posi-

[Plaintiff's counsel indicates an intention to put on some evidence plus perhaps rebuttal.]

"MR. JONES: Your honor, I believe there is also potentially a question, and I think in fairness to any counsel that would [consider taking up the trial for petitioner] I would have to tell them that potentially there could well be other evidence from other employees of the corporation, insofar as their giving testimony as to certain things, that previously—in effect it's rebuttal evidence, if you will, of the plaintiffs' case—but there is a certain amount of that that might potentially have to be put on." See Appendix A at A-6.

[8]Petitioner's OBJECTIONS TO PROPOSED FINDINGS OF FACT (etc.) Clerk's Transcript, p. 258, lines 14-15.

tion on this relatively uncomplicated matter—a position incidentally, to which the court immediately assented.[9]

After briefly describing these events, the Court of Appeal opinion rejects petitioner's due process arguments. It states that petitioner, on this appeal "does not explain why counsel for the three family members, who comprise the corporation, refused to appear for the corporate entity. This fact is made even more mysterious by the fact that the same counsel now represents the corporation on appeal."[10]

This oblique language provides the sum total of that Court's "holding" on the issue. Whatever it may amount to as a statement of law, it completely misstates the contents of the briefs before it. Far from ignoring the issue, petitioner's Reply Brief (pp. 6-7) had explained precisely

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[9]Though the argument against allowing plaintiffs' amendments was at once simple and compelling, the court's expressed reason for adopting it is not insignificant of its attitude toward petitioner:

THE COURT: "The point is if I were to allow [amendment to bring in new causes of action, even] as against the corporation only——

MR. GLICKMAN [plaintiffs' counsel]: Yes, sir.

THE COURT: ——Wouldn't the corporation be entitled to a chance to answer it?

MR. GLICKMAN: That's correct your Honor.

THE COURT: They are not represented by counsel now, but if we were on an amended complaint, I think I would be duty bound to allow them a certain time to answer, to allow the corporation a certain time to answer. So under the circumstances, Mr. Glickman, I'm going to deny both of your motions.

[10]Appendix B at 2. It may be of interest that the counsel who represented petitioner in the Court of Appeal, feeling that their integrity had been impugned, withdrew from any further representation of petitioner. In this petition for certiorari (as in the California Supreme Court) petitioner is represented by a San Francisco firm that has had no connection with any other part of the case.

why the firm which represented petitioner on appeal had been willing only to represent the individuals at the resumption of the trial below. Having no previous familiarity with petitioner's case, the firm was unwilling to step in at mid-trial under the time constraints set by the trial court. But no great acquaintance with the case was required in order to represent the three individuals on the limited issue of whether the complaint should be amended in mid-trial to name them and bring in new causes of action against them. All that was required was general familiarity with the procedural context and the cases holding that courts will not generally allow such amendment.[11] Thus petitioner's Reply Brief states at p. 7: "the preparation necessary to oppose [the motion to amend the complaint] on behalf of said individuals cannot be equated with the preparation which would have been required as counsel for [the corporation], to step into a trial which had commenced four months before and had already consumed sixteen days."

The Reply Brief also noted the impossibility of taking up the trial since no transcript of the prior proceedings would be available in 30 days. Of course none of this is in the trial record because the trial court silenced Athans before he could say it. But petitioner represents to this Court (as it did below) that Athans would have so testified and provided the trial court with letters from attorneys rejecting the case because of the time constraint imposed by the trial court. (Those letters are available to this Court on request.)

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[11]The hearing record itself suggests the relative simplicity of the issue. Mr. Wilson managed to confine his successful argument against allowing the amendment to less than two record pages.

REASONS FOR GRANTING THE WRIT

I

REVIEW BY THIS COURT IS NECESSARY TO AVERT MANIFEST INJUSTICE AND TO SETTLE IMPORTANT ISSUES OF FEDERAL CONSTITUTIONAL LAW

Petitioner respectfully suggests that this is an appropriate case for summary reversal without argument. That expeditious procedure minimizes the costs in this Court's time but allows it to do justice where lower court decisions are "so clearly out of line with applicable authority that argument is unnecessary in order to reverse."[12] Summary reversal has been used in review of patently erroneous state court judgments. See, e.g., *Amer v. Superior Court*, 334 U.S. 813(2) (1948), *Von Cleef v. New Jersey*, 395 U.S. 814 (1969), *Shipley v. California*, 395 U.S. 818 (1969).

At the risk of seeming presumptuous, we would further suggest that a reversing opinion in this case could be very brief indeed. Actually no more is needed than a summation of the facts and a bare recitation of the language of the due process clause. For the facts of this case are inconsistent with the most minimal and literal understanding of that language as it has been interpreted since virtually the foundation of the Republic.[13] For instance:

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[12]Address by Clark, J. "Some Thoughts on Supreme Court Practice" (Univ. Minn. Law School Alumni Assn., 1959).

[13]Thus *Ex parte Wall*, 107 U.S. 265 (1883) quotes Judge Cooley's Constitutional Limitations which defines due process from Daniel Webster's argument in the Dartmouth College case: "a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial."

That every litigant is entitled to "his day in court, by which is meant that he . . . has been afforded an opportunity to be heard";[14] that arbitrary refusal "in any case, civil or criminal . . . to hear a party by counsel employed by and appearing for him" denies due process;[15] that due process further includes "the right to introduce evidence and have judicial findings based on that evidence";[16] that "courts should 'indulge every reasonable presumption against waiver'" and that they should "not presume acquiescence in the loss of fundamental rights"[17] and that "presuming waiver from a silent record is impermissible."[18]

II

AN OPINION BY THIS COURT COULD PROVIDE WORTHWHILE GUIDELINES AS TO DUE PROCESS REQUIREMENTS IN SUCH SITUATIONS

While suggesting that this case may be disposed of by just quoting the 14th Amendment, petitioner does not mean to deny the utility of a lengthier opinion. The advantage petitioner sees in a lengthier opinion is that it

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[14]*Galpin v. Page*, 18 Wall. (85 U.S.) 350, 368 (1874).

[15]*Powell v. Alabama*, 287 U.S. 45, 69 (1938). See also *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919) and *United States v. U.S. Gypsum*, 438 U.S. 422, 461-2 (1978) and cases there cited.

[16]*Baltimore & Ohio Railroad Company v. United States*, 298 U.S. 349, 368-9 (1936) (enormous string citation omitted).

[17]*Barker v. Wingo*, 407 U.S. 514, 526 (1972) quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) quoting *Aetna Insurance Company v. Kennedy*, 301 U.S. 389, 393 (1937) and *Ohio Bell Tel. Company v. Public Utilities Comm'n.*, 301 U.S. 292, 307 (1937).

[18]*Carnley v. Cochran*, 369 U.S. 506, 516 (1962), *North Carolina v. Butler*, 47 U.S.L.W. 4454, 4455, n.4 (1979). Although these cases relate to the right to appointed counsel in criminal trials, they rely upon the civil and criminal due process cases cited in footnote 17 supra.

would allow the enunciation of basic due process requirements for situations in which defense counsel for a corporation moves to withdraw in mid-trial.

In drawing those guidelines, this Court might find useful the three propositions that appear from a review of state and federal cases concerning generally related circumstances.[19] First, that a trial court can permit a litigant's counsel to withdraw only if it is willing to allow the litigant a continuance or continuances reasonably sufficient to engage new counsel who will have time to adequately prepare the case. Second, that if the trial court is not willing to continue the trial it may not allow counsel to withdraw, but must require him to try the case. Third, that whichever option the trial court chooses, it bears the affirmative responsibility of making a record which fully justifies the decision.[20]

The latest of the cases is *Vann v. Shilleh*, 54 C.A.3d 192, 126 Cal.Rptr. 401 (Cal. App. 1975). The defendants in this case were a corporation and its officer, a layman.

[19]In surveying these cases, however, it may be important to note that in none of them was the fact situation as extreme as the present case. In none of these cases did a litigant's attorney seek to withdraw in mid-trial, rather than some time before. In none was the trial anything as extensive and difficult as petitioner's, which lasted four weeks. And, in all but two of these other cases, the litigant was an individual, rather than a corporation. Thus, even though deprived of counsel, the litigant was at least able to appear to offer some defense, however inadequate.

[20]Petitioner would suggest yet another proposition specific to cases involving corporate defendants. Although a corporation may be barred from appearing through a lay person, the trial court is still required to examine the facts before it holds that a defendant has waived its due process rights by wilfully failing to secure counsel. When a spokesperson for the corporation has made clear its desire to present information on the waiver issue, it is the court's duty to *swear and question that person as a witness* if it will not hear him as a representative.

When their defense counsel withdrew (by their permission) a few days before trial, they were denied a continuance to obtain new counsel. Instead the trial court forced the individual defendant to try the case for himself and the corporation. The appellate court reversed on the ground that denial of the continuance was an abuse of discretion and that a layman cannot appear for a corporation.

Yet another case involving abuse of discretion in denial of a continuance is *Barrett v. Gagnon,* 515 P.2d 1202. (Alaska, 1973). Here the trial court had warned defendant in advance that it would not grant a continuance for her to obtain new counsel if she allowed her present attorney to withdraw shortly before trial. She nevertheless reluctantly did so and undertook the defense herself because her "attorney stated in open court that unless she signed his fee agreement he would do no preparation for the trial if ordered by the court to represent her, and that in such a case he would be her attorney on record but not in spirit." 516 P.2d at 1204. In reversing the judgment against appellant, the Alaska Supreme Court cited numerous cases in which continuances had been held improperly denied, and differentiated the few in which they had been upheld:

> "There are cases in which appellate courts have upheld discretion of a trial court in denying a request to continuance following such a trial court warning as was given in the case at bar. In those cases the appellate court was able to point either to the absence of any showing of diligence by appellant in attempting to secure new counsel, or to a long history of delays and continuances by appellant evident

in the record. Neither element is present in the case at bar."

The obverse side of the coin is illustrated by cases like *Laskowitz v. Shellenberger,* 107 F.Supp. 397 (S.D. Cal. 1952). There a corporation's counsel moved to withdraw after discovery and pretrial had been completed, and the case was at issue, though apparently no trial date had been set. The court refused to allow the withdrawal, despite the fact that the corporation consented. Noting that a corporation cannot enter a defense except by counsel, the court held that not a withdrawal motion, but only a substitution of attorneys could be allowed.

To the same effect is *Imhoff v. Hammer,* 305 A.2d 325 (Del. 1973) ("we can well understand the trial court's impatience with this very stale case . . . [but] if trial on the appointed day was deemed imperative, leave to withdraw should have been denied, in our opinion, and counsel should have been required to proceed.") See also *Finch v. Wallberg Dredging Company,* 281 P.2d 136 (Idaho, 1955) and *Shankle v. Shankle,* 223 S.E.2d 380 (N.C., 1976).

The latter two cases combine the propositions relied upon by petitioner. They hold that, in such a situation, the trial court may either grant both the motion to withdraw and the request for continuance, or deny both. But it may not grant the motion to withdraw and then deny the continuance, because this denies the litigant's day in court. *Shankle,* which condemned the denial of a continuance, quotes the following from *Smith v. Bryant,* 141 S.E.2d 303 (N.C. 1965), in which the trial court was reversed for allowing defendant's attorney to withdraw upon a claim of non-payment of fees:

> "It is quite possible that Mr. Rhoe's withdrawal from this case was entirely justified; that he gave defendant adequate notice; and that she negligently or contumaciously failed to attend to her case. If these are the facts, however, the record fails to show them. It may well be that another trial will not improve defendant's situation; but, since she asked for it, on this record she is entitled to it." 141 S.E.2d at 306.

* * * * *

Petitioner believes that this case provides this Court an important occasion for briefly outlining appropriate due process guidelines in some situations. But candor compels the admission that this is no more than a secondary reason for urging a grant of certiorari in this case. The primary argument for certiorari is that it would allow this Court, without undue cost in time, to rectify what petitioner can only describe as an outrageous miscarriage of justice. If that description seems heated, petitioner would invoke the language with which this Court reversed a similar judgment (rendered against civil defendants who had been silenced by the arbitrary imposition of a default): "It is difficult to speak of a decree thus rendered with moderation. It was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence." *Windsor v. McVeigh,* 93 U.S. 274, 288 (1876). See also *Galpin v. Page,* 18 Wall. 350, 368: "Judgment without [notice and opportunity to be heard] wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal.

February 11, 1980

Respectfully submitted,

DON B. KATES, JR.
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Counsel for Petitioner

(Appendices Follow)

Appendices

Appendix A

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

Friday, October 15, 1976

Appearances:

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MARLENE SHELTON, CSR # 828
Official Reporter

LOS ANGELES, CALIFORNIA; FRIDAY, OCTOBER 15, 1976; 1:45 P.M.

THE COURT: Good afternoon, gentlemen.

MR. JONES: Good afternoon, Your Honor.

MR. GLICKMAN: Good afternoon, Your Honor.

THE COURT: I hear you had some trouble.

MR. JONES: I think we have it taken care of. Apparently it was a problem with my fuel line.

THE COURT: Okay. This is the matter of a motion to withdraw as attorney of reference [sic-record?] and there is an application for order shortening time.

The record will show that Mr. Athans III is in open court, as well as Mr. Glickman and Mr. Jones.

Did you receive a copy of this motion, Mr. Athans?

MR. ATHANS: Yes, your Honor.

THE COURT: When did you receive it?

MR. ATHANS: I received it several days ago.

MR. JONES: I believe service on that was made last Friday morning.

THE COURT: Here's the proof of service [indicating]. I didn't see it.

MR. ATHANS: October 8th.

THE COURT: October 8th. All right. Do you have anything to add to your moving papers, Mr. Jones?

MR. JONES: No, Your Honor. The only other comment I would add is the situation has not changed since the time of the declaration executed by Mr. Garvin, and other than that I would simply submit it.

THE COURT: All right. Now, Mr. Athans, have you made any arrangements, in the event that this motion is granted, to obtain other counsel?

MR. ATHANS: Well, I have tried, your Honor, unsuccessfully. I have spoken with two different law firms. One of them doesn't want to touch it under any circumstances. Another one would require a $10,000 cash retainer to be paid first, and then they said it would take them about two months to get ready for trial.

THE COURT: Well, you realize that the trial is much more than half over.

MR. ATHANS: Yes.

THE COURT: And it was referred out under an order of reference and is supposed to be back here on November

15th, and I think if things had been progressing normally, shortly after the 15th the court would be in a position to make a ruling.

Now, do you have any statement that you wish to make, Mr. Athans?

MR. ATHANS: Yes, Your Honor. I feel that Svenson and Garvin should be required to stay on and continue the trial to its conclusion because of the fact that we have had four weeks of trial already, and probably in another week or so of trial it could be concluded.

THE COURT: Did you read the affidavit of Mr. Jones in support of his order, in support of the motion?

MR. ATHANS: I read the declaration of Mr. Garvin.

THE COURT: Mr. Garvin. That's what I mean. Did you read those?

MR. ATHANS: Yes, I did, Your Honor.

THE COURT: Do you have any issue to take with the accuracy of the statements and the correspondence that he attached thereto?

MR. ATHANS: Yes, I do. There are some half truths and misstatements in that declaration.

THE COURT: Well, let's hear them.

MR. ATHANS: On page 4, lines 9 to 13, Mr. Garvin implied that the last payment received by his office from Athans Engineering was on June 10, 1975. There were several other payments made from Athans Engineering.

THE COURT: On this matter?

MR. ATHANS: Not on this matter, but several other matters that their office was handling.

THE COURT: The last payment, is it true that the last payment received from you on this matter was June 10th?

MR. ATHANS: No, Your Honor. Since that time we have made another payment of $2,000.

MR. GLICKMAN: That appears to be on page 4, line 25.

THE COURT: Yes, I see that.

"Approximately three weeks went by before our office received any payments, and on July 27th our office received one payment of $2,000. Since that time we have received no other funds from our client."

Is that true?

MR. ATHANS: True, yes.

THE COURT: All right. What else?

MR. ATHANS: We have a dispute with the law firm of Svenson and Garvin on this matter, and on other matters, as to the arrangement for fees and as to the work that has been done.

THE COURT: This trial started in this department on July 13th of 1976, 16 separate minute orders since that time. At least one—some days, of course, we did not go the whole day. I don't want to check back, but the proceedings in this court stopped on August 6th, and the order of reference signed August the 13th, and the CPA's have been working on this thing, with the cooperation of Mr. Jones and Mr. Glickman, and you haven't paid them anything since July.

How much do you owe them now?

MR. ATHANS: That's a matter of dispute, Your Honor. Mr. Garvin sent a letter in which he claimed a sum of approximately $18,000.

THE COURT: What do you think you owe them?

MR. ATHANS: I think that we don't owe them anything because of the way that they have handled this case, and other matters.

However, I am prepared, in order to enable them to finish the trial, I have brought down with me a check for a thousand dollars which I am prepared to pay to them today.

THE COURT: As payment in full?

MR. ATHANS: No.

THE COURT: I'm interested in your statement that you don't think you owe them anything for this trial. On what basis do you base that fact?

MR. ATHANS: Well, on the fact that I have taken the joint venture agreement, the pleadings, and some of the other correspondence regarding this case to other attorneys and I have had them read it over, and they tell me that the joint venture agreement was very poorly written, to begin with, and that the pleadings are contradictory and poorly written and that they feel that our attorneys have not done a good job in this case.

THE COURT: But they don't want to handle it themselves, is that right?

MR. ATHANS: That is right.

THE COURT: Doesn't that tell you something, Mr. Athans?

MR. ATHANS: Well, I realize that it would be very difficult for another attorney to take over, and as one of

the attorneys said, they would like a payment of $10,000 just to start.

THE COURT: Well, let me tell you something. This trial isn't over yet. Most of the evidence is in. I think all the evidence is in, if I'm not mistaken, with the exception of the offset, if any, with respect to Powell and Morris; all of it is in, except the offset that might be disclosed by the audit, of Morris and Powell.

Is that true?

MR. GLICKMAN: And evidence to explain my client's acts and our case in rebuttal, we're virtually over.

MR. JONES: Your Honor, I believe also there was potentially a question, and I think in fairness to any counsel that would look at the thing, I would have to tell them that potentially there could well be other evidence from employees of the corporation, insofar as their giving testimony as to certain things that previously—in effect it's rebuttal evidence, if you will, of the plaintiff's case—but there is a certain amount of that that might potentially have to be put on.

THE COURT: All right. Well, let me tell you this, Mr. Athans. So far, without hearing any of the other evidence—this is so far, up to now—Mr. Jones has done one hell of a job in your behalf.

When you take the job he's done, and you take your testimony and your brother's testimony and your father's testimony, so far, and you compare those two, it's like the difference between night and day. So far you and your brother and your father are probably the most lacking in credibility witnesses I've seen in about 20 years on the bench.

The trouble with your lying, and you have been lying, is that you have to keep remembering what you said, and you auger [sic-argue?] yourself into a worse situation.

This is one of the few cases I have had where most of the impeachment has come from you, vis a vis your brother, vis a vis your father, and you have the gall to sit there and say that your attorney didn't do a good job. What do you expect him to do, manufacture?

MR. ATHANS: Let me explain. I have no quarrel with the job Chris Jones has done. I agree with you.

THE COURT: Yet you say you don't think you owe them anything?

MR. ATHANS: I'm speaking of the law firm of Svenson and Garvin. I am not speaking of Chris Jones.

THE COURT: Do you have anything else you want to offer?

MR. ATHANS: Well, yes. I would like to offer payment on account to Svenson and Garvin of a thousand dollars if they continue on the case to its conclusion.

THE COURT: Will you accept that, Mr. Jones?

MR. JONES: No, Your Honor, I would not.

THE COURT: I don't blame you. Your motion is granted.

We will continue this thing to November 15th.

MR. ATHANS: I would like to add one other thing. Miss Janine Casey was taken ill and hospitalized, and as I understand is still in the hospital and might be hospitalized for some period of time.

THE COURT: The case will be continued to November 15th. We'll see her condition then. And if you come in here and ask for a continuance on the grounds that you don't

have counsel I will tell you right now it will be denied. Do you understand that?

MR. ATHANS: I understand that, Your Honor.

THE COURT: Also, have you decided what is owing on the audit or estimate as to what is owing on the audit?

MR. GLICKMAN: In preparation of this afternoon's hearing I spoke to Louis Lampert, CPA, and his son today, at about quarter of 12:00, and they both advised me, particularly the son who is doing the audit, that he is 94 percent done, that he expects to have his report in final form by next Friday, and that he feels the total fee will be in the area of $1,500. Each side has already paid him 500, so we are within about $250 from each side being due, which my clients would be prepared to pay forthwith.

THE COURT: Half of that.

MR. GLICKMAN: Yes.

THE COURT: That is 250. All right.

MR. GLICKMAN: He told me that would probably include two hours either in court, with conferring with the judge or with counsel; that would all be included in the $1,500 figure.

THE COURT: All right. Now, Mr. Jones—

MR. GLICKMAN: I might add, just for the record, I have—I am a very busy trial lawyer and I'm in trial just, I have a case a week, and I have set aside both on my calendar and the court's computer the week of November 15th for this trial.

THE COURT: Yes.

MR. GLICKMAN: Other than that, I go through March, and I don't want this matter being continued.

THE COURT: It won't go through March.

MR. GLICKMAN: I want to put that on the record.

THE COURT: Well, Mr. Athans, I am not saying this is true in your case necessarily, but one of the famous gimmicks of litigants who stall and delay is to keep changing attorneys in midstream. Then the new attorney says, "Well, I have to get acquainted with it, and we want to delay."

That's not going to work here, if that is your motive. I am not saying it is.

MR. ATHANS: It is not my motive. I would prefer Chris Jones.

THE COURT: He's not going to do it. He is not legal aid for the Athans Corporation or any of the individual Athans.

MR. ATHANS: We are willing to pay them a mutually agreeable daily rate of time from this point on.

THE COURT: If Mr. Jones, according to his moving papers, your own attorney up to now, can't rely on your promises I certainly can't fault him, because I could not rely on your testimony.

MR. ATHANS: I don't know of any promises of ours that he couldn't rely on.

THE COURT: You made promises, then your father wouldn't even talk to them, according to one of these letters. Is that correct, Mr. Jones?

MR. JONES: That's correct, Your Honor.

THE COURT: All right. Your motion is granted. I will expect a statement from Lambert. Ask him when he bills you two—yes, or you, because you're out of the picture now, Mr. Jones—ask Mr. Lambert to send you the whole bill, with an extra copy for me, and I will direct an order to pay your half.

MR. ATHANS: All right.

THE COURT: You understand that?

MR. ATHANS: Yes, sir.

THE COURT: Because I'm not sure whether I can hold you in contempt if you didn't pay your half, but I will do my best to find out if I can, and if I can do it I will do it.

Do I make myself clear?

MR. ATHANS: Yes, Your Honor. We will be willing to repay half of the bill.

THE COURT: All right. Mark that.

Will you give notice?

MR. JONES: I think we prefer to.

THE COURT: All right.

MR. GLICKMAN: Thank you very much, Your Honor.

(Proceedings concluded.)

Superior Court of the State of California
For the County of Los Angeles

Department No. 27 Hon. Steven S. Weisman, Judge

No. C 121032

Willie A. Powell, and John W. Morris, doing business under the fictitious firm name of Esquire Electrical Co., a co-partnership,

Plaintiffs-Respondents,

vs.

J. C. Athans Engineering & Construction Co., Inc., a California corporation, Does I through X,

Defendants-Appellants.

Reporter's Certificate

State of California
County of Los Angeles } ss

I, MARLENE SHELTON, CSR, do hereby certify that the foregoing pages, 1 through 158, inclusive, comprise a true and correct transcript on appeal, as designated by counsel, reported by me on July 22, 28, 29 and 30, 1976, August 2, 4 and 6, 1976, October 15, 1976 and November 15, 1976, in the above-entitled matter.

Dated this 30th day of November, 1978.

/s/ Marlene Shelton, CSR No. 828
Official Reporter

Appendix B

In the Court of Appeal of the State of California

Second Appellate District

Division Two

2 Civil No. 55250
(Super. Ct. No. C 121 032)

Willie A. Powell and John W. Morris,
Plaintiffs and Respondents,
vs.
J. C. Athans Engineering & Construction Co., Inc.,
Defendant and Appellant.

[Filed Sept. 18, 1979]

In an action against J. C. Athans Engineering & Construction Co., Inc., for accounting and declaratory relief based on a joint venture agreement, the trial court entered judgment in favor of plaintiffs and against the corporate defendant.

The corporate defendant has appealed alleging that the trial court erred in permitting its counsel to withdraw part way through the trial and forcing it to continue trial unrepresented. We affirm.

After 15 days of trial, the court ordered the matter continued for approximately 90 days to allow an accounting

firm to audit the activities of the parties. During the interim period and approximately 30 days prior to the continued trial date, the attorney for the corporation was, after a hearing, permitted to withdraw on a showing that the client had failed to cooperate and had failed to pay fees and expenses that were then due.

The client had been notified approximately 17 days prior to the hearing that counsel intended to move to withdraw. Counsel obtained an order to shorten time for service in order to afford the client more time to obtain substitute counsel. At the hearing, a representative of the corporation advised the court that contact had been made with two attorneys, one of whom was willing to appear but only for a retainer fee of $10,000.

When the trial resumed on the appointed date, three individuals, a father and two sons, who were the officers and sole share holders of the corporation appeared with counsel. That counsel, however, specifically disavowed any representation of the corporate entity. No one appeared as counsel for the corporation.

The trial was completed on the same day after admitting certain exhibits offered by plaintiffs. On this appeal the corporation does not attack the findings of the trial court, does not suggest what other evidence might have been produced, does not explain why no motion for new trial was made and most important of all, does not explain why counsel for the three family members, who comprise the corporation, refused to appear for the corporate entity. This fact is made even more mysterious by the fact that the same counsel now represents the corporation on appeal.

The trial court's actions were a proper exercise of discretion. (See Rules 2-111(A)(2), 2-111(C), Rules of Professional Conduct; *Hodcarriers, Etc. Local Union v. Miller*, 243 Cal.App.2d 391; *Denham v. Superior Court*, 2 Cal.3d 557.)

Appellant's actions in this case strike us as legal "game playing." The appeal is frivolous and appears to have been taken for the purpose of delay.

The judgment is affirmed. In addition to the usual costs on appeal, the appellant is ordered to pay to the plaintiffs the sum of $3,000 (three thousand dollars) as sanctions for taking a frivolous appeal. This figure represents an addition of approximately three percent interest per annum on the amount of the judgment for the period beginning with the filing of the Notice of Appeal.

NOT FOR PUBLICATION

/s/ , J.
COMPTON

We concur:

/s/ , Acting P. J.
FLEMING

/s/ , J.
BEACH